Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

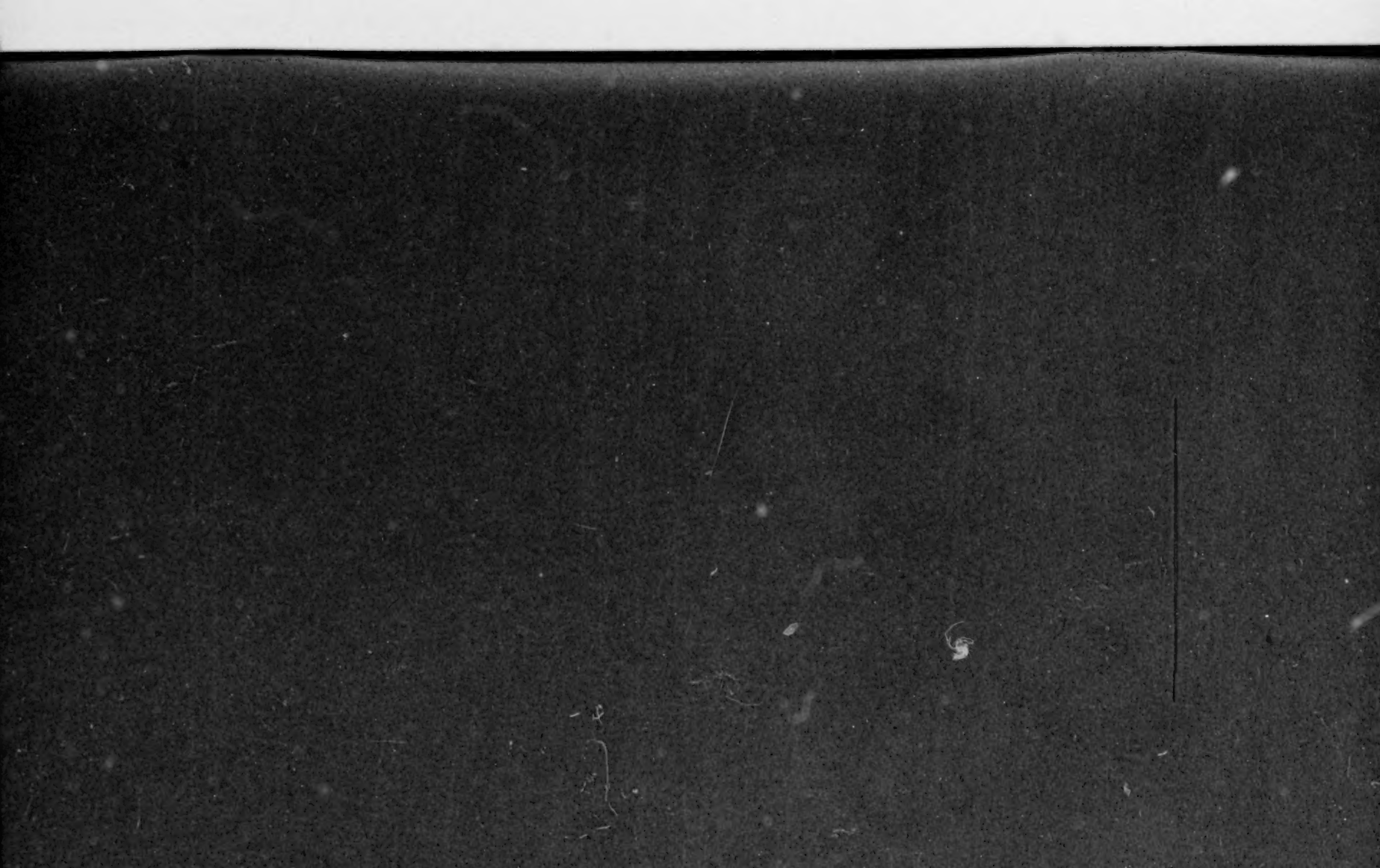
MICHAEL CURTIS KEYS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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64 pp



QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's perjury conviction under the harmless error rule, Fed. R. Crim. P. 52(a), instead of affirming under the plain error rule, Fed. R. Crim. P. 52(b), where respondent did not object at trial to the district court's failure to submit the issue of materiality to the jury, and where there was no serious factual question concerning the materiality of respondent's false testimony.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-30a) is reported at 95 F.3d 874. The panel opinion of the court of appeals (App., *infra*, 31a-54a) is reported at 67 F.3d 801.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1996. On December 2, 1996, Justice O'Connor granted a 30-day extension within which to file a petition for certiorari, to and including January

9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 21, 1991, a federal grand jury in the Central District of California returned an indictment charging respondent Michael Curtis Keys with one count of perjury, in violation of 18 U.S.C. 1623(a). Following a jury trial in January 1992, respondent was convicted and was sentenced to 60 months' imprisonment. Gov't C.A. Br. 2. A panel of the court of appeals affirmed respondent's conviction. App., *infra*, 31a-54a. On en banc review, however, a divided court reversed respondent's conviction. *Id.* at 1a-30a.

1. Respondent's perjury conviction stemmed from false testimony he gave on behalf of a defendant in a federal criminal prosecution. In early 1991, in the United States District Court for the Central District of California, a former Drug Enforcement Administration (DEA) agent, Darnell Garcia, was on trial for conspiracy, drug trafficking, money laundering, and other crimes. Another former DEA agent who had pleaded guilty in the same case, John Jackson, testified for the government in Garcia's trial pursuant to a plea agreement. Jackson testified at length about the drug trafficking, theft, and other illegal activities in which he participated along with Garcia. App., *infra*, 2a-3a; Gov't C.A. Br. 4.

Garcia called respondent Keys as a witness in an effort to impeach Jackson. Keys had been serving time in federal prison for armed bank robbery, and he testified to a conversation he had had with Jackson while they were in the same holding cell in August 1990. According to Keys, Jackson told him that the government had offered him a deal, part of which was

to implicate Garcia; that he knew nothing of Garcia's illegal activities; and that he was nonetheless willing to lie for the government and testify against Garcia in exchange for leniency for himself. App., *infra*, 2a-3a; Gov't C.A. Br. 5.

At the time of Keys's testimony concerning his conversation with Jackson, Keys was incarcerated in the same facility as Garcia. Four days before Keys's testimony in the Garcia trial, he handed some magazines to a guard and asked him to deliver them to Garcia. Hidden among the magazines was a letter from Keys to Garcia, or a "kite," as such smuggled prison letters are called. The guard found and photocopied the kite, however, and gave it to his supervisor. The intercepted kite suggested that Keys had conspired with Garcia to lie for him at trial. App., *infra*, 3a-4a; Gov't C.A. Br. 6. The kite reads as follows (App., *infra*, 3a-4a):

> Hey G.,
>
> I've got everything covered on my end and I'm ready whenever the time is right. I hope that I can really make a difference and you come out on top. Let me know how long you anticipate your thing to last, so I can figure out how long I'll be here. I'm trying to stay as long as I possibly can and try to get a lot done while I'm here. I heard that R.R. left Fri. and he's in Okla. right now. I'm also trying to get a few things from the commissary but they only let us order two cosmetics items a week. If you can hook it up right away I need you to have somebody send this girl some money upstairs, so I can have her get me everything I need from the commissary. It don't have to be nothing but twenty or fifty dollars.

That guy,

P.S. Here's her name and number: Jeanna Carson—Reg. No. 92373-012.

Keys was unaware that the kite had been intercepted, and during his testimony for Garcia, the prosecutor cross-examined him about it. Keys denied writing any letters or notes to Garcia, and he specifically denied writing the kite that the guard had intercepted a few days before. Confronted with the kite itself, Keys again denied writing it, and claimed that it must have been his cellmate who asked the guard to deliver the magazines to Garcia. App., *infra*, 33a-35a. Keys's denials formed the basis for the perjury charge of which he was convicted in this case.

2. At Keys's perjury trial, counsel for both sides proposed an instruction from the Ninth Circuit's Manual of Model Instructions that told the jury it must find three elements beyond a reasonable doubt to convict a defendant of perjury under 18 U.S.C. 1623: (1) that the defendant testified under oath before a court of the United States; (2) that the testimony was false; and (3) that the defendant knew the testimony was false. The court did not mention that the statute also required proof that the false statement was material. In accordance with then-existing Ninth Circuit law, the district court decided that element itself as an issue of law, and it found that the alleged false testimony Keys had given was material. App., *infra*, 4a-5a.

3. After Keys was convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Constitution requires submission to the jury of the issue of materiality when it is an element of a charged offense. On appeal, Keys argued that his con-

viction should be reversed because the district court had decided the element of materiality. A panel of the court of appeals agreed with Keys that the district court had committed error. The court reviewed that error, however, under the plain error rule, because Keys had not objected to the instruction at trial and had in fact jointly proposed it. Following the analysis of *United States* v. *Olano*, 507 U.S. 725 (1993), the court of appeals concluded that the error was plain, assumed without deciding that the error affected substantial rights, but nonetheless determined that, "[b]ecause there was no serious factual question regarding the element on which the court, on defendant's invitation, did not instruct, the error could not seriously affect the fairness, integrity or public reputation of judicial proceedings." App., *infra*, 50a; see *Olano*, 507 U.S. at 736. The panel therefore affirmed Keys's conviction.[1]

4. The full court granted rehearing en banc, and a divided court reversed Keys's conviction. The majority held that, at the time of Keys's trial, which predated *Gaudin*, a "solid wall of circuit authority" would have made any objection futile, and that plain error review of a *Gaudin*-type error under those circumstances would be "unconscionable." App., *infra*, 7a-9a. Finding the plain error analysis of *Olano* "simply inapposite," the court of appeals concluded

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[1] Keys had also argued on appeal that the district court had erred in refusing to substitute new counsel during trial when his attorney asked to withdraw out of fear for her safety. The panel found no error. App., *infra*, 37a-41a. The court also found no plain error in the district court's failure to recite expressly that it had found materiality proven beyond a reasonable doubt (*id.* at 51a-52a), and it rejected Keys's challenges to his sentence (*id.* at 52a-54a).

that, even though Keys had not objected to the failure to submit the materiality issue to the jury, it would review "not for plain error, but only for error under Rule 52(a)." *Id.* at 9a-12a.

Proceeding to a harmless error analysis, the court of appeals concluded that the type of error that occurred here—a failure to instruct the jury on an element of the offense—was a "structural" defect that requires reversal of a conviction except where the reviewing court, from an examination of the facts found by the jury, can conclude beyond a reasonable doubt that the jury necessarily found the omitted element. App., *infra*, 13a-15a. Because the jury's verdict in this case did not logically include a finding of materiality, the court of appeals held that the error could not be deemed harmless, and that it therefore required reversal of the conviction. *Id.* at 15a-16a.

Three judges dissented, observing that the majority's decision puts the Ninth Circuit "at odds with eight other circuits." App., *infra*, 17a (Kleinfeld, J., dissenting). Plain error review is "compelled by the text of Rule 52," the dissent reasoned, and is supported by the principles of *Olano*. *Id.* at 22a-26a.

REASONS FOR GRANTING THE PETITION

In *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), this Court will consider whether plain error analysis is applicable to *Gaudin*-type errors that predate the *Gaudin* decision itself and to which no objection was made at trial. The Ninth Circuit's decision in this case squarely conflicts with the Eleventh Circuit's decision in *Johnson* and with decisions of several other circuits. See App., *infra*, 11a-12a n.7, 18a-19a; U.S. Br. in Response to Pet. for Cert. at 4-6, *Johnson*, *supra*. As we observed in

Johnson (see *id.* at 7-8), we believe that, under Fed. R. Crim. P. 52(b), reversal of a perjury conviction for *Gaudin* error is inappropriate where, as in this case, the defendant did not object to a district court's failure to submit the materiality question to the jury and there is no serious question about the materiality of the false statements at issue.[2] Because the issues presented in this case and in *Johnson* are essentially identical, this petition should be held pending the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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[2] After the Court granted review in *Johnson*, the Tenth Circuit, sitting en banc, held that a *Gaudin* error, whether analyzed under a plain error or harmless error standard, is structural and "thus not amenable to analysis under Fed. R. Crim. P. 52." *United States* v. *Wiles*, No. 94-1592, 1996 WL 707539, at *10-*16 (Dec. 10, 1996). That court would therefore vacate virtually any conviction where a *Gaudin* error occurred at trial. That decision has deepened the conflict among the circuits on the proper standard for reviewing *Gaudin*-type errors.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-50281

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CURTIS KEYS, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

David V. Kenyon, District Judge, Presiding; No. CR-91-00734-DVK

[Argued and Submitted May 23, 1996]
[Decided Sept. 11, 1996]

Before: HUG, Chief Judge, BROWNING, FLETCHER, PREGERSON, JOHN T. NOONAN, Jr., THOMPSON, LEAVY, TROTT, T.G. NELSON, KLEINFELD, and TASHIMA, Circuit Judges

TROTT, Circuit Judge:

Keys was charged with the crime of having made as a witness a false declaration in federal court in violation of 18 U.S.C. § 1623(a), also known as perjury. The statutory "materiality" element of this offense, however, was not submitted for decision to the jury,

but, with the assent of both parties, to the trial judge. This practice reflected the established law of this circuit at the time of the trial. After the judgment of conviction, however, the law changed. The law now mandates that the materiality element of such crimes be decided not by the trial judge, but by the trial jury.

On appeal, Keys asks for the retroactive benefit of this change in the law, and he asks us to review his conviction for error pursuant to Fed.R.Crim.P. 52(a) as though he had objected to the handling of the materiality element. The government takes exception to this request and exhorts us instead to review for "plain error" under Fed.R.Crim.P. 52(b) as defined by the more stringent discretionary standards called for by *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In this regard, Keys and the government present us with significant questions regarding the limits of our authority as an appellate court to review a criminal judgment of conviction. We granted rehearing en banc in *United States v. Keys*, 67 F.3d 801 (9th Cir.1995), to decide these issues. We reverse and remand for a new trial.[1]

I

Facts

Keys was serving time in federal prison for armed bank robbery. A former DEA agent named Darnell Garcia was on trial for conspiracy and other crimes. Another prisoner testified for the prosecution against

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[1] The three-judge panel opinion in this case found at 67 F.3d 801 (9th Cir.1995) is ordered withdrawn. Nevertheless, and with thanks to our colleagues, we draw directly from it regarding our statement of the salient facts and the issues presented by this appeal.

Garcia pursuant to a plea bargain. Garcia called Keys as a witness to impeach the other prisoner. Keys testified that while he and the prosecution witness had shared a cell, the witness told him he was willing to lie for the government against Garcia in exchange for leniency for himself.

Keys had previously sent a letter to Garcia, who was being held in the same facility. Keys hid the letter among some magazines he asked a guard to deliver to Garcia. A letter smuggled past prison officials to another prisoner is called a "kite." The intercepted kite lends itself to the inference that Keys conspired with Garcia to lie for him at trial. The text of the letter reads:

> Hey G.,
>
> I've got everything covered on my end and I'm ready whenever the time is right. I hope that I can really make a difference and you come out on top. Let me know how long you anticipate your thing to last, so I can figure out how long I'll be here. I'm trying to stay as long as I possibly can and try to get a lot done while I'm here. I heard that R.R. left Fri. and he's in Okla. right now. I'm also trying to get a few things from the commissary but they only let us order two cosmetics items a week. If you can hook it up right away I need you to have somebody send this girl some money upstairs, so I can have her get me everything I need from the commissary. It don't have to be nothing but twenty or fifty dollars.
>
> That guy,

P.S. Here's her name and number: Jeanna Carson—Reg. No. 92373-012.

The guard found and photocopied this letter, and unknown to Keys, he provided a copy of it to his supervisor. On cross-examination, the prosecutor asked Keys about the kite, and he denied sending it. His denials became the subject of the false declaration charge of which he stands convicted.

II

Instructional Error

Counsel for both sides proposed, and the court gave from our Ninth Circuit Manual of Model Instructions, an instruction correct under the law as it then stood:

COURT'S INSTRUCTION NO. 16

> The defendant is charged in Count One of the indictment with having made a false declaration in violation of Section 1623 of title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant testified under oath before a court of the United States;
>
> Second, the testimony was false; and
>
> Third, the defendant knew that the testimony was false.

The instruction, No. 8.29C, did not submit the issue of the materiality of the false testimony to the jury as one of the elements which the government had to prove beyond a reasonable doubt. Yet the statute

criminalizes only such false testimony as is material. The statute uses the language, "Whoever under oath . . . makes any false material declaration. . . ." 18 U.S.C. § 1623(a).

This model instruction was based on established Ninth Circuit law. We had held in *United States v. Clark*, 918 F.2d 843, 845 (9th Cir.1990), that "materiality is an issue of law for the court to decide." In *Clark*, we followed the rule set out by the Supreme Court in *Sinclair v. United States*, 279 U.S. 263, 298, 49 S.Ct. 268, 273, 73 L.Ed. 692 (1929). In accord with this understanding, the trial court found that Keys's alleged false declaration was material. No mention of this finding was made to the jury.

III

Analysis

A. Application of New Rule of Law

In *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that "a new [constitutional] rule for the conduct of criminal prosecutions is *to be applied retroactively to all cases*, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328, 107 S.Ct. at 716 (emphasis added). Embracing Justice Harlan's view, the Court said that failure to do so "would violate[ ] basic norms of constitutional adjudication." *Id.* at 322, 107 S.Ct. at 713 (citing *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)). In the instant case, such a new rule was announced in this circuit in 1994 after the defendant's trial in 1992 and before his judgment of conviction became final. The "new rule" is that the

materiality element of an allegedly actionable statement must be submitted for a finding in a jury trial to the jury, not to the court.

We announced this holding in *United States v. Gaudin*, 28 F.3d 943 (9th Cir.1994) (en banc), a case in which the defendant had been charged with making material false statements in violation of 18 U.S.C. § 1001. We held it was error for the district court to have instructed the jury that the materiality element of the charge was established as a matter of law. The Supreme Court unanimously affirmed our landmark holding in *United States v. Gaudin*, —— U.S. ——, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The question presented as described by Justice Scalia was "whether it was *constitutional* for the trial judge to refuse to submit the question of 'materiality' to the jury"; and the answer to this question was "no." *Gaudin*, —— U.S. at ——, 115 S.Ct. at 2312 (emphasis added).

As our colleague Judge Kleinfeld observed in the earlier three-judge panel opinion in this case, Justice Scalia expressed the logic of the *Gaudin* Court in a syllogism:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Keys, 67 F.3d at 808 (citing *Gaudin*, —— U.S. at ——, 115 S.Ct. at 2314). We agree with Judge Kleinfeld's analysis that "[t]his syllogism applies with equal force to the perjury statute at issue in this

case, 18 U.S.C. § 1623," *id.*, because the text of the statute renders criminal only false declarations that are "material," and because materiality contains a "factual component." *See Gaudin*, 28 F.3d at 949; *Gaudin*, —— U.S. at ——- ——, 115 S.Ct. at 2318-19 (The proposition that the element of materiality in a perjury prosecution is to be decided by a judge is "contrary to the uniform general understanding."). Accordingly, we overrule our holding in *Clark* that in a perjury prosecution, materiality is a question of law for the court to determine; and we disapprove old Model Instruction No. 8.29C. Thus, under *Griffith*, Keys is entitled to the benefit of this new constitutional rule because it was announced after his trial and before his case had become final.

B. Error for Which We Review

It would seem axiomatic, therefore, that we should proceed at this point using the Rule 52(a) standard of review to decide whether the application of the *Gaudin* principle to this case requires us to reverse Keys's conviction. The government suggests, however, that because he acquiesced in the use of the standard materiality instruction at his trial, the review to which he is now entitled is not under Rule 52(a), but for "plain error" under Rule 52(b) as currently defined under the stringent *Olano* standards. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). We respectfully disagree.[2]

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[2] The government also argues that we must disregard this instructional error because it was "invited." We reject this contention for reasons that are apparent in our discussion of the applicability of "plain error." *United States v. Guthrie*, 931 F.2d 564, 567 (9th Cir.1991), is inapposite.

Since 1970, we have advised criminal defense counsel in this circuit that when faced with a "solid wall of circuit authority" endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that "solid wall" suddenly crumble in the interim and render the instruction defective. As we noted,

> An exception [to the instruction] would not have produced any results in the trial court. Under these circumstances were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on their settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

United States v. Scott, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc). Accordingly, we gave Scott on appeal the benefit of a new constitutional rule which was articulated after his trial but before his judgment of conviction had become final.[3]

We repeated this reassuring message in 1988 in *People of Territory of Guam v. Yang*, 850 F.2d 507 (9th Cir.1988) (en banc), and we referred in passing to

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[3] This approach in the District of Columbia Circuit is called the "supervening-decision doctrine." *United States v. Washington*, 12 F.3d 1128, 1139 (D.C.Cir.1994) ("The supervening-decision doctrine reflects the principle that it would be unfair, and even contrary to the efficient administration of justice, to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success.").

our consistent application of the *Scott* "solid wall" principle "when appropriate." *Id.* at 512 n. 8. Most importantly, we explicitly held in *Yang* that "even though defense counsel did not object contemporaneously to the trial court's instruction, *we review the instruction for reversible error, rather than plain error.*" *Id.* (emphasis added).[4] We described this holding as an "exception to Fed.R.Crim.P. 30" prohibiting a party from assigning as error any instruction or omission therefrom to which the party did not timely object. *Id.* We see no distinction whatsoever in the *Scott/Yang* context between not objecting on one hand, and affirmatively offering a settled model instruction on the other.[5]

Given this illuminating backdrop, two observations are pertinent. First, to subject the judgment of conviction of a defendant such as Keys, whose counsel adhered to a settled rule of law, to review for "plain error" would be unconscionable. Such a holding would render our *Scott/Yang* solid wall doctrine a hoax and be tantamount to a double-barreled message to counsel: (1) do not rely on our opinions; and (2) object to everything or your clients' arguments on appeal may be measured by a more restrictive standard.

Second, *Olano* deals with Rule 52(b) "forfeited" error. 507 U.S. at 732-35, 113 S.Ct. at 1776-78. In contrast, Rule 52(a) deals with "nonforfeited error." *Id.* at 731, 113 S.Ct. at 1776. Given our *Scott/Yang*

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[4] We disapprove any suggestion in *United States v. Nash*, 76 F.3d 282 (9th Cir.1996), to the contrary.

[5] The comment to the Model Instruction said that "materiality of a false declaration is . . . a question of law for the trial court to determine . . . and need not be submitted to the jury."

doctrine, the validity of which we again affirm, treating Key's counsel's assent to the application of settled law as a "forfeiture" (or as "invited error" or "waiver") would be illogical and plainly unfair. To label what happened in this trial an "error" can only be appropriate after the fact and in the light of new legal developments. Without a contemporaneous error, there was nothing to forfeit, to invite, or to waive. As the Second Circuit said in *United States v. Viola*, an attorney "cannot be said to have 'forfeited a right' by not making an objection, [because] at the time of trial no legal right existed." 35 F.3d 37, 42 (2nd Cir.1994). We address on appeal such a supervening change in the law as "error," but to process it in *Olano* "forfeited error" (or "invited error") terms is manifestly wrong.

Furthermore, the heightened standard of review suggested by the government is at odds with *Griffith* which "instructs" us (as a "lower court") "to apply new rules retroactively to cases not yet final." 479 U.S. at 323, 107 S.Ct. at 713. Such mandatory language is flatly inconsistent with Rule 52(b) *Olano* plain error, notice of which by an appellate court is only discretionary:

> Rule 52(b) is permissive, not mandatory. If the forfeited error is "plain" and "affect[s] substantial rights," the Court of Appeals has authority to order correction, but is not required to do so. The language of the Rule ("may be noticed"), the nature of forfeiture, and the established appellate practice that Congress intended to continue, all point to this conclusion. "[I]n criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United

> States, in the exercise of sound discretion, may notice [forfeited error]."

Olano, 507 U.S. at 735-36, 113 S.Ct. at 1778 (quoting *Sykes v. United States*, 204 F. 909, 913-14 (8th Cir.1913)).

The approach we take in this case reaffirms our statement in *Yang* that we review under these special circumstances not for plain error, but only for error under Rule 52(a). Our mode of analysis is akin to the *Griffith*-oriented approach in *United States v. Mkhsian*, 5 F.3d 1306 (9th Cir.1993), a post-*Olano* case. In *Mkhsian*, we permitted a non-objecting defendant to benefit from a sea-change in the law, and we did not require him to satisfy the *Olano* standards. We did so based on *Griffith*, and we looked only for error as controlled by Rule 52(a). *Id.* at 1311.[6]

In the main, we conclude that *Olano* in these circumstances is simply inapposite.[7] As explained,

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[6] We had used the same approach before *Olano* in *United States v. Montoya*, 945 F.2d 1068 (9th Cir.1991). Citing *Griffith*, we said, "Although *McCormick* [*v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991)] was decided after the jury verdict and thus not available to the district judge when he instructed the jury, we must apply the *McCormick* standards on appeal"; and the panel then did, reversing and remanding on the affected counts. The *Montoya* opinion is notable also for its absence of any mention or analysis of plain error.

Any suggestion in *U.S. v. Lessard*, 17 F.3d 303, 305 (9th Cir.1994), or *United States v. Sterner*, 23 F.3d 250 (9th Cir.1994), that we applied "plain error" review in *Mkhsian* is erroneous. To the extent that *Lessard* and *Sterner* suggest a different approach to this issue, they are disapproved.

[7] We are aware that our analysis differs from cases decided in other circuits, but we are not persuaded that their approach

Olano deals with Rule 52(b) and the concept of forfeiture, a concept which does not fit in this case. Moreover, *Olano* did not involve a situation where a new rule had intervened in the adjudicatory process, making a "clear break" with the past. Where, as here, a defendant faced with a solid wall of authority endorsing a jury instruction acquiesces in or fails to object to it, that defendant is entitled on appeal to the benefit of the new rule without being held to plain error standards.

C. Rule 52(a) Error

The question we must now answer is whether the processing of the materiality element in this case requires reversal, or not, a question we address in the general context of Rule 52(a): "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." We note also that because the instructional error here is of constitutional dimension, to be disregarded it must be harmless beyond a reasonable doubt.

On remand from the Supreme Court, we noted in *Olano III* that:

> [U]nder Rule 52(a), most error constitutes " 'trial error'-error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." . . . Some error is not

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is correct. *See, e.g., United States v. Retos*, 25 F.3d 1220, 1228-33 (3d Cir.1994); *United States v. Viola*, 35 F.3d 37, 41-43 (2d Cir.1994); *United States v. Ross*, 77 F.3d 1525 (7th Cir.1996); *United States v. Kramer*, 73 F.3d 1067 (11th Cir.1996).

> susceptible to harmless error analysis and is per se prejudicial. Such error consists of "structural defects in the constitution of the trial mechanism. . . . [Such] constitutional deprivations [are] structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

United States v. Olano, 62 F.3d 1180, 1188-89 (9th Cir.1995) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 1263-65, 113 L.Ed.2d 302 (1991)).

In *Gaudin*, we held that the error inherent in instructing a jury that an element of the crime charged was established as a matter of law could not be harmless because it was "structural." We said that "[w]hen proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all." 28 F.3d at 951. Nevertheless, in *Roy v. Gomez*, 81 F.3d 863 (9th Cir.1996) (en banc), we subsequently identified a distinction between cases like *Gaudin* in which "a court instructs the jury that an element of the crime has been established as a matter of law," and cases like Keys's in which the trial court "simply fails to alert the jurors they must consider it." *Id.* at 866. In the latter circumstance, we allowed that

> Even though an element of the offense is not specifically mentioned, it remains possible the jury made the necessary finding. Review for harmless error is appropriate, but it is the type of review discussed in *Carella [v. California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989).]

> That is, the omission is harmless only if review of the facts found by the jury establishes [beyond a reasonable doubt] that the jury necessarily found the omitted element.

Id. at 867 (emphasis in original). Thus, although the manner in which the materiality element was processed in this case is quite similar to the error in *Gaudin*, we apply the *Carella* harmless error test as explained in *Roy*. The state has the burden of showing that the error was harmless beyond a reasonable doubt. *Id.* at 868 ("On direct appeal, relief is granted for constitutional error unless the state demonstrates the error was harmless beyond a reasonable doubt.").

The *Carella* harmless error test is satisfied "*only* if the reviewing court can tell what the jury actually found, [because] *only then* can the court conclude 'beyond a reasonable doubt' . . . that the jury found the facts necessary to support the conviction." *Id.* at 868 (quoting *Carella*, 491 U.S. at 271, 109 S.Ct. at 2424) (emphasis added) (citation omitted). As we explained in *Roy*:

> It was for the jury, not the judges who have reviewed the case, to determine which interpretation of the evidence was correct. We are not free to evaluate the evidence and postulate what the jury would have found had it been properly instructed. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt *has been found by a jury* according to the procedure and standards appropriate for criminal trials."

Id. at 867 (quoting *Carella*, 491 U.S. at 269, 109 S.Ct. at 2422) (emphasis added in *Roy*). If a reviewing court

cannot tell what the jury actually found, because there are no findings from which a reviewing court could conclude that the jury necessarily found the omitted element, then the *Carella* harmless error analysis ends and reversal is required. *Id.* at 868.

Looking at the record and in particular the whole of the instructions given to the jury, we note that the only reference to materiality made to the jury was in connection with the court's statement of the charge against him:

> Count One of the indictment charges that defendant Michael Curtis Keys violated Title 18, United States Code, Section 1623, which provides in pertinent part as follows: "Whoever under oath . . . in any proceeding before or ancillary to any court of the United States knowingly makes a false *material* declaration is guilty of an offense against the United States."

(emphasis added). Immediately after this statement of the offense, the court—as set out earlier in this opinion—identified the specific elements of the offense required to be proved by the government beyond reasonable doubt. Not surprisingly, materiality was not one of them. Given these factors, we are certain only that the jury found that (1) Keys testified under oath in district court, (2) his testimony was false, and (3) he knew it was false. In making such findings either individually or collectively, the jury would not necessarily have had to find that the false testimony in question was material to the issues under consideration, especially given the lack of instructional guidance on the meaning of materiality. Thus, the *Carella* harmless error test for constitutional instructional defects cannot be satisfied, the error mani-

festly affects substantial rights, and Keys is entitled to a new trial.

IV

Conclusion

Changing the rules after the event and requiring a second trial is understandably troublesome, but a trial is not a game, and the Constitution is not a set of game rules. The Constitution is a solemn promise that the people of this nation have made to each other that neither life nor liberty shall be taken by our government without faithful adherence to certain basic principles. As Justice Scalia observed in *Carella*,

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the state.

491 U.S. at 268, 109 S.Ct. at 2422 (Scalia, J., concurring); *Gaudin*, 28 F.3d at 946-47 (quoting *Carella*, 491 U.S. at 268, 109 S.Ct. at 2422).

Our fundamental principles are subject to refinement and reinterpretation as we live and learn from

experience. As distasteful as it may be for both the government and the defendant to start over, the fate of a single trial pales in comparison to the imperative of keeping faith with the charter of our collective existence.

Accordingly, because the record demonstrates that the jury did not determine the materiality of the alleged false declaration, the judgment of conviction is defective no matter how strong the evidence of guilt may be. We reverse and remand for a new trial.[8]

KLEINFELD, Circuit Judge, with whom BROWNING and LEAVY, Circuit Judges, join, dissenting:

I respectfully dissent.

Our decision today puts us at odds with eight other circuits. We are the only circuit to have resolved this issue as we now have. Our original panel decision, *United States v. Keys*, 67 F.3d 801 (9th Cir.1995), followed the similar approach in two other circuits. Six other circuits have since gone the same way. This national uniformity has been shattered by today's different approach. We got it right the first time.

Though hypertechnical in form, the question we resolve today has considerable practical importance. Two recent changes of law, for example, will require an enormous number of retrials under today's decision. One makes materiality in perjury and false statement cases an element to be submitted to the jury. See *United States v. Gaudin*, —— U.S. ——, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The other generally limits "use" of a firearm during and in rela-

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[8] Our holding renders moot Key's other claims.

tion to certain crimes to "active employment." *See Bailey v. United States*, —— U.S. ——, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). Requiring new trials after a long delay inevitably means many guilty people will go free, because witnesses will be unavailable, evidence will be lost, or surprise which exposed perjury (as happened to Keys) will be gone. Even where the retrials produce accurate results consistent with the original trials, much will be lost. The courts, jurors, lawyers and witnesses will have wasted their scarce time retrying cases in which guilt had already been fairly and accurately established in an earlier trial.

Here is the body of authority with which we today set up an intercircuit conflict: *United States v. Webster*, 84 F.3d 1056 (8th Cir.1996); *United States v. David*, 83 F.3d 638 (4th Cir.1996) (citing *Keys*); *United States v. Randazzo*, 80 F.3d 623 (1st Cir.1996) (citing *Keys*); *United States v. Ross*, 77 F.3d 1525 (7th Cir.1996) (citing *Keys*); *United States v. Allen*, 76 F.3d 1348 (5th Cir.1996) (citing *Keys*); *United States v. Kramer*, 73 F.3d 1067 (11th Cir.1996) (citing *Keys*); *United States v. Viola*, 35 F.3d 37 (2d Cir.1994), cert. denied, —— U.S. ——, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995) (applying plain error review to jury instructions where supervening authority made instructions error pending appeal); *United States v. Retos*, 25 F.3d 1220 (3rd Cir.1994) (refusing to adopt per se rule that omission of an essential element (*Gaudin* error) constitutes plain error requiring reversal).[1]

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[1] The District of Columbia Circuit has articulated a "supervening-decision doctrine." Like our panel opinion in *Keys*, and our "solid wall of circuit authority" doctrine, this treats a post-judgment "supervening decision" as justification for treating a decision correct when made as "plain error." If failure to ob-

These other eight circuits have applied Rule 52(b), as construed by *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), to omission of the materiality element in perjury and false statement jury instructions. They are on all fours with today's case. Ironically, five other circuits have cited our original *Keys* decision and applied the same reasoning, and only the Ninth Circuit (today) has rejected the earlier Ninth Circuit decision. Our rejection of our earlier decision needlessly puts stability and predictability of the law in our circuit in doubt.

Analysis must begin with the text of Rule 52:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed.R.Crim.P. 52. The question in this case is what to do about a jury instruction in these circumstances: (1) it was correct when given; (2) the defendant requested it; (3) it became defective in light of a subsequent decision; (4) the defendant has not shown that a proper instruction would have made any dif-

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ject is excused by the supervening-decision doctrine, then apparently *Olano* analysis would be applied. *See United States v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.) *cert. denied*, —— U.S. ——, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994); *United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C.Cir.1995), *cert. granted & judgment vacated*, —— U.S. ——, 116 S.Ct. 1562, 134 L.Ed.2d 662 (1996).

ference to the outcome. The correct answer is that nothing should be done about it. That answer is compelled by the text of Rule 52 and by *Olano*.

When the Supreme Court reversed us in *Olano*, it gave clear instructions on how appellate courts should deal with errors and defects which were not brought to the attention of the trial court. The Court inferred from the text of Rule 52 that we are not permitted to take notice of errors and defects not brought to the attention of the trial court unless three conditions are met: (1) there must in fact be error or defect; (2) the error must be "plain" and (3) the error must affect "substantial rights." 507 U.S. at 733-34, 113 S.Ct. at 1777.

"If the forfeited error is plain and affects substantial rights, the Court of Appeals has authority to order correction, but is not required to do so." *Id.* at 735, 113 S.Ct. at 1778. If these conditions are met, appellate courts must exercise discretion whether to correct the error, under the criteria for the exercise of discretion set out in *Olano*. *Id.* at 736, 113 S.Ct. at 1778-79. Appellate courts may correct error meeting the conditions only if one of two criteria for the exercise of discretion is met. One is "miscarriage of justice," that is, conviction of an innocent person. *Id.* Keys has not attempted to argue on appeal that he is innocent.

The alternative *Olano* ground for the exercise of discretion to correct such error is that it "seriously affects the fairness, integrity or reputation of judicial proceedings." *Id.* That standard is not met in the case at bar. Keys was given a fair trial under the law as it existed at the time. "Reputation of judicial proceedings" does not suffer from affirming a conviction

under a jury instruction correct when given, but defective in light of a change in the law, if the defect would have made no difference to the outcome of the particular case. What really hurts the "reputation of judicial proceedings" is vacating a criminal conviction because of what laymen properly call a "technicality," that is, a technical defect which made no practical difference in the particular case.

"Integrity . . . of judicial proceedings" means their reliability as a means of distinguishing the innocent from the guilty. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . ." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). Omitting the element of materiality from Keys' jury instruction had no bearing on reliability, because materiality was indisputable and not at issue.

The word "materiality" means that "the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, —— U.S. at ——, 115 S.Ct. at 2313 (internal quotation marks omitted). Keys' defense was that he did not do it, not that what he did was immaterial. He claimed he had not written the kite, did not send it, and that the former DEA agent was not the person to whom the kite was addressed. If the jury in the DEA agent's trial had believed Keys, acquittal would have been more likely. Whether the jury in that case believed the prosecutor's insinuation that Keys had sent the kite, or Keys' denial, would have a natural tendency to influence whether the jury believed Keys.

Keys had an opportunity to argue materiality in his perjury case, albeit to the judge rather than the jury. The prosecutor asked the judge if he was making a determination, and the judge said "As to materiality, definitely. The court finds that it is material." Defense counsel offered no argument to the contrary, doubtless because she did not want to squander her credibility with the judge on a frivolous argument. This case should be distinguished from *Gaudin* on the facts as well as on the difference between what the judge told the jury in *Gaudin* and in *Roy v. Gomez*, 81 F.3d 863 (9th Cir.1996) (en banc). In *Gaudin*, "there was a serious factual question for the jury as to whether a block checked on line 303 of the HUD-1 Settlement Statement could have a tendency to influence the agency's decision to secure the loan." *United States v. Gaudin*, 28 F.3d 943, 952 (9th Cir.1994). That is, materiality was seriously at issue in *Gaudin*, and a jury might well have decided that the false statement was immaterial.

The fork in the road where the majority goes the wrong way is in the choice whether to use Rule 52(a) or 52(b). The majority does not dispute the analysis above, under Rule 52(b). Rather, it reasons that Rule 52(a) applies under *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), and the cases relieving a party from failure to object when a "solid wall of circuit authority" would have made objection futile. See *People of Territory of Guam v. Yang*, 850 F.2d 507, 512 n. 8 (9th Cir.1988); *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir.1970). The majority's analysis in this critical respect is textually and logically mistaken. The mistake leads to

vacating a criminal conviction on an immaterial technicality.

Rule 52(a) requires appellate courts to disregard any "error, defect, irregularity or variance" if the error is "harmless," in the sense that it "does not affect substantial rights." Arguably omission of the materiality element in Keys' jury instructions should be classified as harmless error under subsection (a), but this is not the critical divide between my view and the majority's.

Burden of persuasion differs critically between subsections (a) and (b). Under subsection (a), the prosecution has "the burden of showing the absence of prejudice," *Olano*, 507 U.S. at 741, 113 S.Ct. at 1781, and "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. State of California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Subsection (b), by contrast, imposes the burden on the defendant:

> It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. . . . This burden-shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does not affect substantial rights" . . . Rule 52(b) authorizes no remedy unless the error does "affec[t] substantial rights."

Olano, 507 U.S. at 734-35, 113 S.Ct. at 1778 (citations omitted; brackets in original). The error does not "affect substantial rights" just because the defendant had a substantial right to a different jury instruction. The phrase generally means that the error "must have affected the *outcome* of the District Court proceedings." *Id.* at 734, 113 S.Ct. at 1778 (emphasis added). Keys has not shown why a jury might well have acquitted him had it been told to determine whether his lie about the kite was material. Therefore the choice between subsections (a) and (b) of Rule 52 determines the outcome of today's decision.

The choice between subsections (a) and (b) is compelled by the text of the rule, and supported by *Olano* and all the other circuits which have considered this question. Subsection (b) says it applies to errors and defects which "were not brought to the attention of the court." Keys did not bring absence of the materiality element in the instruction "to the attention of the court." Therefore Rule 52(b) applies. That should be the end of the case.

Griffith v. Kentucky has no bearing on the choice between subsections (a) and (b). Under *Griffith*, Keys is entitled to the benefit of *Gaudin* because that decision came down while Keys' case was still pending on direct review. Evaluating the defect in his jury instruction under subsection (b) gives him the benefit of *Gaudin*. The choice between subsections (a) and (b) did not arise in *Griffith*. In *Griffith*, defense counsel had objected to racially based peremptory challenges to jurors, even though *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), had not yet come down.

The majority reasons from our "solid wall of circuit authority" cases, *Scott* and *Yang*, that because there was at the time no error, and counsel properly did not object, that Rule 52(a) applies. But the conclusion does not follow from the premises, logically or practically.

Our "solid wall of circuit authority" doctrine was an exception to the general rule that invited error was not reviewable at all, except in "exceptional situation[s] where reversal is necessary to preserve the integrity of the judicial process or prevent a miscarriage of justice." *People of the Territory of Guam v. Alvarez*, 763 F.2d 1036, 1038 (9th Cir.1985). *See also United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir.1994); *Wilson v. Lindler*, 995 F.2d 1256, 1262 (4th Cir.1993); *United States v. Ahmad*, 974 F.2d 1163, 1164 (9th Cir.1992); *United States v. Schaff*, 948 F.2d 501, 506 (9th Cir.1991); *cf. United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir.1993); *United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir.1986) (when defendants themselves propose the instruction, "review is totally barred"); *United States v. Katzman*, 461 F.2d 655, 656 (9th Cir.1972). Keys' attorney proposed the defective instruction, and the judge gave it. Our contemporaneous decision in *United States v. Perez*, 67 F.3d 1371 (9th Cir.1995) (en banc), modifies our past invited error doctrine, but because Keys is entitled to raise the invited defect in the instruction regardless, under the "solid wall of circuit authority" doctrine, the *Perez* modification makes no difference to his case.

Griffith gives Keys another benefit as well. It turns an instruction which was not defective when given into "plain" error or defect.

But the defect in the jury instruction was still "not brought to the attention of the court." *See* Fed.R.Crim.P. 52(b). It was "forfeited error" in the terminology of *Olano*, 507 U.S. at 732, 113 S.Ct. at 1776-77, because there was no timely assertion of the right to a materiality instruction in the district court. Subsection (a) of Rule 52 applies where the defense counsel has brought the problem to the attention of the court, and the court has erred anyway. Subsection (b) applies where the defect was "not brought to the attention of the court." This difference allows a trial judge to give the lawyers some room to shape their own cases, except where error is "plain," instead of ignoring the lawyers' decisions whether to object and concentrating only on the judge's independent research into technical "error."

The majority is concerned that it is unfair to require Keys to show that the defect affected substantial rights, because there was no error and he had no reason to object. That is incorrect, because forfeited error is still reviewable. "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777. Nor does it matter that there was no "error" at the time the judge instructed the jury. Rule 52(b) applies to "errors or defects," not just "errors." This language enables an appellate court to reverse for a defect which was not an error at the time. The absence of any error by the trial judge, and the subsequent change of law, cannot elevate intensity of appellate review from subsection (b) to subsection (a), where the defect was "not brought to the attention of the court." There is but "a single category of

forfeited-but-reversible error." *Olano*, 507 U.S. at 732, 113 S.Ct. at 1776.

Nor is it unfair to require Keys to show that absence of the materiality element mattered in his case, as a condition of getting a new trial. It is unfair to the rest of society to vacate a conviction because of a defect which was not an error when made, and which the defendant has not shown to have affected his substantial rights. Wigmore explains that the orthodox English rule held that error in the analogous situation of admitting or excluding evidence "was not a sufficient ground for setting aside the verdict and ordering a new trial unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." 1 Wigmore on Evidence § 21 at 884 (Tillers rev.1983). An 1830 case in the Court of Exchequer created a new rule that "error of ruling created per se for the excepting and defeated party a right to a new trial." *Id.* at 887. Wigmore says that this rule has been reformed away by legislation, but "[t]he fetters of the pernicious rule of the Exchequer were not forged by mere precedent but by professional habit and tendency." *Id.* at 893. Our court made a failed attempt to revive the "pernicious rule of the Exchequer" in *United States v. Olano*, 934 F.2d 1425 (9th Cir.1991), and does it again today. The language of Rule 52 is one of the ways that legislatures have attempted to reform away the Exchequer rule. Wigmore at 894, n. 12. As Wigmore put it, "the absurd and provoking technicality" of reversals for defects not bearing on the truth of the verdict are why "a desperate criminal may hope to tire out all endeavors to do justice on him." *Id.* at 891.

Fairness to Keys is achieved by letting him bring to an appellate court's attention a defect in a jury instruction, even though it was correct when given and even though Keys himself requested it. Fairness to the rest of society is achieved by requiring Keys to show, as a condition of getting his conviction vacated, that the defect affected substantial rights.

Here is what we should do, in cases of unobjected to jury instructions correct when made, but plainly incorrect in light of a change of law while appeal was pending. We should read the briefs and relevant record excerpts and decide whether there was a "serious factual question," *Gaudin*, 28 F.3d at 952, such that, had the jury been instructed under the law as changed, a reasonable jury might well have acquitted. If so, we should vacate the conviction so that the defendant gets a new trial. But if, in the particular case, it has not been shown that the new instruction would have made a difference, we should let the jury's determination of guilt stand. Thus, under my analysis, if a defendant checked the wrong box on a loan application, and the jury might well have decided that the loan would have been insured anyway, as in *Gaudin*, he should get a new trial. If a drug dealer indisputably carried a gun to a drug sale, and did not object to a jury instruction which included mere availability as well as active use and carrying of a firearm, he should not get a new trial despite the *Bailey* defect. A reasonable jury would have convicted him of carrying regardless of the "use" language. Most often, criminal jury trials present two competing factual scenarios, or one factual scenario explained by two competing theories. This analysis is a practical way consistent with *Olano* and Rule 52(b)

to avoid an appellate result which wastes the time and rejects the judgment of the jury which returned a perfectly reasonable verdict on the facts of the case.

I cannot agree with the majority's claim that application of subsection (b) is a "double-barreled message to counsel: (1) do not rely on our opinions; and (2) object to everything. . . ." Our law is not so unstable that it commonly changes in relevant ways while cases are pending on appeal. As for objecting to everything, if a lawyer does that, his voice becomes mere background noise which a trial judge ignores. Good lawyers preserve their credibility with the judge and jury by limiting their objections to those for which there is some legal basis, and which matter to the case. If there is a subsequent change of law while the case is pending on appeal, and the lawyer did not object, he can still obtain a reversal under Rule 52(b) if the defect mattered to the case.

Suppose in Keys' case that the jury had been instructed that they could not convict unless they found not only that Keys had lied, but also that his lie was material. There is no reason to doubt that the verdict would have been the same. Keys had no materiality argument which could be made on the facts of his case, so the jury would have reached the same result had it been given a materiality instruction. Then why should Keys have his conviction vacated because the materiality instruction was not given? Considering whether the defect would have mattered to the jury's decision does not usurp the jury function, because it argues for letting the jury verdict stand, instead of setting it aside because of a technical judicial cavil. *Id.* at 890. The "affecting substantial rights" language of Rule 52(b) is an

appellate standard, not a reversal of the burden of proof at trial, and it applies only to convicted criminals who are presumed guilty because they have been found guilty at trial.

It is unfair to society to vacate a criminal conviction on account of a defect which was consistent with the law at the time, consistent with what the parties asked the trial court to do, and which made no practical difference to the case.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-50281

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CURTIS KEYS, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Argued and Submission Deferred March 10, 1994]
[Resubmitted July 28, 1994*]
[Decided Sept. 29, 1995]

Before WALLACE, Chief Judge, FARRIS and KLEINFELD, Circuit Judges

KLEINFELD, Circuit Judge:

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* We recognized at the time of argument that the disposition of this case might turn on our then pending en banc decision in *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993), discussed below. Our en banc decision came down subsequently, at 28 F.3d 943 (9th Cir.1994), but the case was not completed, because the Supreme Court granted a writ of certiorari. The Supreme Court issued its decision June 19, 1995, in *United States v. Gaudin*, — U.S. ——, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), so we then submitted the case at bar for decision.

Among the issues raised in this case are what a lawyer can do when she feels her client presents a danger in court, whether she must be relieved as counsel, and whether in a perjury prosecution the element of materiality must be submitted to the jury. Issues of invited error and sentencing guidelines are also raised.

I. Facts

Keys was serving time in federal prison for armed bank robbery. A former DEA agent was on trial for conspiracy and other crimes. Another prisoner testified for the prosecution pursuant to a plea bargain. The former DEA agent called Keys as a witness to impeach the other prisoner. Keys testified that while he and the prosecution witness had shared a cell, the witness told him that he was willing to lie for the government against the former DEA agent in exchange for leniency for himself.

Keys had sent a letter to the former DEA agent, who was being held in the same facility. He hid the letter among some magazines he asked a guard to deliver to the former DEA agent. A letter smuggled past prison officials to another prisoner is called a "kite." The cryptic letter lends itself to the inference that Keys conspired with the former DEA agent to lie for him at trial. Here is the text of the letter:

Hey G.,

I've got everything covered on my end and I'm ready whenever the time is right. I hope that I can really make a difference and you come out on top. Let me know how long you anticipate your thing to last, so I can figure out how long I'll be here. I'm trying to stay as long as I possibly can and try to get a lot done while I'm here. I heard that R.R. left Fri. and he's in Okla. right now. I'm also trying to get a few things from the commissary but they only let us order two cosmetics items a week. If you can hook it up right away I need you to have somebody send this girl some money upstairs, so I can have her get me everything I need from the commissary. It don't have to be nothing but twenty or fifty dollars.

That guy,

P.S. Here's her name and number: Jeanna Carson—Reg. No. 92373-012.

The guard found and photocopied the letter, and provided the copy to his supervisor, but Keys did not know that. On cross examination of Keys, the prosecutor asked him about the kite, and Keys denied sending it:

Q. Now in addition to talking through the doors to Mr. Garcia, you have also communicated with him by sending him kites, isn't that right?

A. No.

Q. When I say kites I include letters.

A. No.

Q. Handwritten letters?

A. No.

Q. Typed Letters?

A. No.

Q. Notes?

A. No.

Q. Typed notes?

A. No.

Q. Isn't it a fact that just last Monday, on February 11 of this year, you sent a kite to Mr. Garcia?

A. No.

MS. KARLIN: Your Honor, may I approach the clerk with an exhibit that has been marked as 2000-E?

THE COURT: Certainly.

THE CLERK: Government's exhibit number 2000-E is marked for identification and is before the witness.

(Witness read document.)

Q. (BY MS. KARLIN) Mr. Keys, you have got exhibit 2000-E in front of you, don't you?

A. Yes, plaintiff's exhibit.

Q. Pardon?

A. Yes.

Q. And that is a letter that you typed to Mr. Garcia on February 11, 1991, isn't that correct?

A. No.

Q. Isn't that a letter that you attempted—that you sent to Mr. Garcia on February 11, 1991?

A. No, it is not.

Q. Isn't this a letter that you hid in some magazines that you asked a prison guard to deliver to Mr. Garcia at the MDC on February 11, 1991?

A. No, it is not.

Q. Isn't it a fact that at approximately 7:45 p.m., officer Rodney Montgomery, was asked by you to pass some magazines to Darnell Garcia?

A. No. I believe that you must be talking about my cell partner.

The government used this testimony of his about the kite as the basis for a perjury indictment against Keys. The case at bar is his appeal from his conviction and sentence in this perjury case.

In the middle of trial, Keys said something to his lawyer, Elsa Leyva, which caused her to feel that safety in the courtroom might be in danger. She told the U.S. Marshals to stay alert during trial. Ms. Leyva has carefully avoided disclosing what her client said to her, evidently in order to preserve Keys' attorney-client privilege if it applies. She disclosed only her subjective belief subsequent to whatever her client said. Here is the extent of what she revealed:

> On Wednesday, January 8, 1992, I had a conversation with my client in the U.S. Marshal's lockup. Based on that conversation, I believed that my personal safety and the safety of court personnel might be in danger. I requested that the U.S. Marshals in the courtroom be advised and be extra alert during trial. On Thursday, January 9, 1992, I had a conversation with the court in chambers that revealed my request to the U.S. Marshal's service.

The district judge held extensive hearings with counsel, without and then with Keys present, to decide how to proceed. The judge felt that Keys had to be advised of what was going on.

Ms. Leyva moved to withdraw as counsel. She said, "at this time, I cannot continue to represent Mr. Keys. I am not able to represent him effectively and with undivided loyalty. To continue to represent him is to provide him ineffective assistance of counsel at a

time when he most needs and deserves the effective assistance of counsel." The district court denied Ms. Leyva's motion to be relieved as counsel.

II. Analysis

A. Counsel's Motion to Withdraw.

Keys argues that the district court should have substituted new counsel for Ms. Leyva and granted a mistrial after Ms. Leyva advised the marshals of a potential security concern. The district court held a hearing to consider Ms. Leyva's motion to be relieved as counsel, in which Keys, after consultation with another attorney, joined.

The judge carefully considered whether Ms. Leyva's representation had been impaired because she had been put in fear by something her client had said. He concluded that she was doing an excellent job defending Keys:

> But as far as I'm concerned, everything I have seen done by defense counsel has been, I suppose you could dramatically say, in the highest tradition. I have no doubt that she has given her all on this and has fought the fight for this client, up until this day, with all her of heart and mind. And I just simply—that should just be made clear. That's my very, very, clear impression. This is not a case where the court thinks that the lawyer has kind of goofed off and fiddled around and not gotten to it. In no way is that this case. This is a dedicated defense lawyer who is running in—has run into a situation which is, I suppose, inevitable on occasions but through no doing of her own.

The judge expressed the view that if there were a total breakdown in communication between lawyer and client, he would have to grant a mistrial. He thought that Ms. Leyva's concern about safety was legitimate, especially because Keys and other witnesses were from Marion Penitentiary, the maximum security federal institution. But based on his observations, he did not think communication had totally broken down. The judge noted that "defense lawyers are used to these things in minor degrees." Ms. Leyva conceded that she had, subsequent to Keys' statement which put her in fear, spoken to him in a locked room at the jail, whispered to him in court, sat close to him, and maintained a good relationship with him. She was concerned that this relationship would deteriorate after Keys found out she had advised the marshals to stay alert, but the judge concluded that Keys was entitled to know, in case he had a subsequent challenge to her representation.

After trial, in the order denying the motion for new trial, the judge found that Ms. Leyva had discussed strategy with Keys, prepared him to testify, and otherwise vigorously defended the case. The judge specifically found that "Leyva and Keys conferred and communicated with each other on several occasions after the motion for substitution of attorney was denied." The judge also denied the motion, because under the circumstances, it would enable the defendant to get a mistrial by making threats in the middle of trial. "I do not believe that it is appropriate to grant a mistrial in a situation where the fault lies solely within the conduct of the defendant."

In *United States v. Gonzalez*, 800 F.2d 895, 898 (9th Cir.1986), we said that the factors relevant to whether

the district court abused its discretion in denying a motion for substitution of counsel were "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense." In this context, a motion is untimely if "substitution would delay the proceedings." *See United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380-81 (9th Cir.1991). Granting Keys' motion would have necessitated a mistrial to allow replacement counsel an opportunity to prepare. The motion was untimely. *See Gonzalez*, 800 F.2d at 898-99 (motion made on second day of trial untimely). No question has been raised concerning adequacy of the court's thorough and careful inquiry. The judge expressly found that there was not a "total lack of communication preventing an adequate defense," and the record supports that finding. The judge properly considered two additional factors, that defense counsel face disquieting concerns about their clients from time to time, and that substituting counsel too readily in the middle of trial would empower criminal defendants to obtain mistrials by their own wrongdoing. *See United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir.1993) ("any breakdown in communication between [defendant] and his current counsel was entirely [defendant's] fault."). We review denial of the motion for withdrawal and substitution of counsel for abuse of discretion, *id.*, and conclude that the district judge did not abuse his discretion.

Keys argues that Ms. Leyva was obligated to withdraw, and the court should have allowed her to

withdraw, because she was ethically obligated to keep her client "reasonably informed about significant developments," Cal.R.Prof.Conduct 3-500, her "mental condition renders it unreasonably difficult to carry out the employment effectively," Cal. R. Prof. Conduct 3-700(B), and to "maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client." Cal. Bus. & Prof.Code § 6068(e). Ms. Leyva cannot be faulted for not withdrawing. She attempted to withdraw, and the district judge would not allow it. The district judge's exercise of discretion is evaluated by federal law standards, as set out above. Ms. Leyva did not disclose what Keys said to her. To the extent that her disclosure intimated that he had said something which suggested a security risk, his "announced plans to engage in future criminal conduct" would be unprotected by the attorney-client privilege. *Nix v. Whiteside*, 475 U.S. 157, 174, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986); *United States v. Friedman*, 445 F.2d 1076, 1085 (9th Cir.1971). We need not decide whether failure to disclose to Keys the communications that Ms. Leyva made to the marshals would have entitled Keys to any relief, because after the colloquy between counsel and the court about whether Keys should be told, he was told.

Many lawyers would feel less enthusiastic about keeping their clients out of prison if the clients put them in fear of their physical safety. Nevertheless, many criminal defendants are, in fact, dangerous criminals. Ms. Leyva properly advised the court of a potential danger, and continued, as the district court found, to perform effectively as Keys' advocate, regardless of her feelings. The defendant is entitled to

no more than this. A criminal defendant is not entitled to an attorney who likes and feels comfortable with him. *See Morris v. Slappy*, 461 U.S. 1, 12-14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983) (no right to "a meaningful attorney-client relationship" or "rapport"); *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir.1991) (no right to a "meaningful relationship"). A defendant's right to the effective assistance of counsel does not entitle him to a friend. Nor is the client entitled, when he himself has put his lawyer in fear, to a lawyer who feels no fear. A lawyer can effectively represent a client she fears and dislikes; that has always been part of a lawyer's calling, necessary to preserving justice for all. The defendant is constitutionally entitled to effective representation of counsel, nothing more, and Keys received that entitlement.

B. Materiality.

Counsel for both sides proposed, and the court gave, an instruction correct under the law as it then stood:

COURT'S INSTRUCTION NO. 16

> The defendant is charged in Count One of the indictment with having made a false declaration in violation of Section 1623 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant testified under oath before a court of the United States;
>
> Second, the testimony was false; and

> Third, the defendant knew that the testimony was false.

This instruction was based on the Ninth Circuit model instruction for false declarations.

The instruction did not submit the issue of the materiality of the false testimony to the jury as one of the elements which the government had to prove beyond a reasonable doubt. Yet the statute criminalizes only such false testimony as is material. The statute uses the language "Whoever under oath . . . makes any false *material* declaration. . . ." 18 U.S.C. § 1623(a). The instruction did not require the jury to find materiality beyond a reasonable doubt.

Our model instruction, in the Ninth Circuit Manual of Model Criminal Jury Instructions at § 8.29C, was based on established Ninth Circuit law. We had held in *United States v. Clark*, 918 F.2d 843, 845 (9th Cir.1990), that "materiality is an issue of law for the court to decide." We followed the rule set out by the Supreme Court in *Sinclair v. United States*, 279 U.S. 263, 298, 49 S.Ct. 268, 273, 73 L.Ed. 692 (1929).

The instruction has, subsequent to the trial in the case at bar, turned out to be erroneous. So is the model form. In a perjury prosecution under 18 U.S.C. § 1623(a), materiality is an element of the crime and must be submitted to the jury. In *United States v. Gaudin*, 28 F.3d 943 (9th Cir.1994) (en banc), we held that the element of materiality in a prosecution for making false statements on loan documents under 18 U.S.C. § 1001 is a question of fact for the jury. The Supreme Court affirmed, in *United States v. Gaudin*, — U.S. ——, 115 S.Ct. 2310, 132 L.Ed.2d 444 (U.S.1995) (No. 94- 514). The *ratio decidendi* of the

Supreme Court decision requires that *Gaudin* be extended to perjury prosecutions under 18 U.S.C. § 1623(a), not limited to 18 U.S.C. § 1001 cases.

In *Gaudin*, Justice Scalia writing for a unanimous Court laid down a syllogism:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Id., — U.S. at ——, 115 S.Ct. at 2314. This syllogism applies with equal force to the perjury statute at issue in this case, 18 U.S.C. § 1623. Section 1623(a) provides:

> Whoever under oath (or in any declaration, certification, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false *material* declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a) (emphasis added). Materiality is an element of perjury under section 1623, so the defendant is entitled to have a jury decide whether his false statement was material.

Keys' attorney, quite properly under existing law, joined in the request for the instruction which the court gave. Generally, a defendant is not entitled to relief because of an error in a jury instruction the defendant joined in proposing, because the error is invited. "Where the defendant himself proposes the jury instruction he later challenges on appeal, we deny review under the invited error doctrine." *United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir.1993). In this case, the law changed after trial. Review of invited error in an instruction may be appropriate "when the issue arises by virtue of a change in law while the appeal is pending." *United States v. Mkhsian*, 5 F.3d 1306, 1310 (9th Cir.1993). We do not require defense counsel to preserve an objection in the face of "a solid wall of circuit court authority, including our own." *United States v. Scott*, 425 F.2d 55, 57 (9th Cir.1970) (en banc). Review for reversible error is not conditional upon an objection which plainly would have been "futile." *Guam v. Yang*, 850 F.2d 507, 512 n. 8 (9th Cir.1988) (en banc).

Although the *Mkhsian* change of law exception permits review of invited error, it does not require it. Review of invited error, even where permitted, is discretionary. *Cf. United States v. Kimball*, 896 F.2d 1218, 1219 (9th Cir.1990). *Mkhsian* eliminates the effect of the defense invitation to make the error, because the law which rendered the invitation mistaken came down after trial. This nevertheless leaves the trial judge in the position of having acted without objection and in compliance with existing law. It would be unreasonable to make the judgment more vulnerable to challenge where the trial judge so acted pursuant to defense request, than where he

acted without the defense leading him into error. Once the legal effect of the invitation to err disappears because of the good excuse of a subsequent change of law, then the error falls within the "single category" of "forfeited-but reversible error," that is, "questions which had not previously been specifically urged." *United States v. Olano*, — U.S. ——, ——, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993).

The Supreme Court recently clarified what it characterized as limitations on appellate authority to correct error not brought to the attention of the trial court. Appellate authority is constrained by Federal Rule of Criminal Procedure 52, to "plain errors . . . affecting substantial rights":

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed.R.Crim.P. 52(b). The Court identified three criteria, each of which is a "limitation on appellate authority": (1) there must be error; (2) the error must be "plain"; (3) the error must "affect substantial rights." *Olano*, — U.S. at —— - ——, 113 S.Ct. at 1777-78.

We have already identified the instruction as error. Ordinarily for error to be "plain," it must be clear and obvious, but the Court did not decide whether this standard applies in "the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at ——, 113 S.Ct. at 1777. The case at bar is that "special case." The error was not "plain" when made. We therefore cannot review it at all, unless an error not "plain" at trial, but "plain" because of a subse-

quent change in the law, can properly be treated as "plain" for purposes of Rule 52.

Plainness is a prerequisite to reviewability, but does not compel review. Review remains discretionary. Because of the function which plainness performs, a necessary but not sufficient condition for review, we conclude that error which becomes plain because of post-trial change of law is "plain" for purposes of Rule 52.

Defense counsel had good reason not to ask for an instruction different from what established precedent required. From the defense point of view, it would be unfair to deny review because the error was not plain at the time of trial, and requiring objection to escape the plain error bar to review would burden trial courts with meritless objections. *Cf. Guam v. Yang*, 850 F.2d at 512 n. 8; *Scott*, 425 F.2d at 57. An error by virtue only of a post-trial change of law could never be "plain" at the time of trial.

The court, prosecution, witnesses, and jury also have a great deal invested in the trial. The judge did nothing wrong by following established precedent. We should not review the error as though it had been brought to the judge's attention, and in the face of contrary law, the judge went the wrong way. *Cf. Guam v. Yang*, 850 F.2d at 512 n. 8 (trial court used a Devitt & Blackmar instruction contrary to a Guam statute, relying on our unpublished affirmance of another judgment based on the Devitt & Blackmar instruction). The error might not have mattered. It is unfair to burden society with retrial, and release of criminals where evidence has disappeared during pendency of appeal, where trials were conducted fairly

according to law, subsequent law made some trial decision incorrect, and the error did not matter.

Other circuits have generally provided for discretionary review of error, not plain at trial, which becomes plain pending review because of a change in the law. *Cf. United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir.1994) (plainness viewed from perspective of law as it stands at the time of appellate review, but court only reverses if all *Olano* factors are met); *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir.1994) (plainness viewed from perspective of law as it stands at the time of trial, but adding that if the current law at time of appellate review shows plain error, then the burden shifts to the government to demonstrate lack of prejudice); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.1994) (law viewed at the time of trial but then applying separate "supervening-decision" analysis); *United States v. Calverley*, 37 F.3d 160, 162-63 (5th Cir.1994) (en banc) (plainness viewed from perspective of law as it stands at the time of the trial, but not specifically addressing issue). Our decision permitting review as "plain error" of error not plain at trial but which becomes plain pending review avoids intercircuit conflict.

The third *Olano* prerequisite to reviewability of error not objected to is that it affect substantial rights. "In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Olano*, — U.S. at ——, 113 S.Ct. at 1778. A "burden-shifting" to the defendant "is dictated" by the language of Rule 52(b). *Id.* "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights'

prong of Rule 52(b)." *Id.* The Court left open the question of whether a category exists, of "errors that can be corrected regardless of their effect on the outcome." *Id.* Thus whether "structural errors" need not satisfy the "affecting substantial rights" prerequisite is unsettled. We do not resolve the issue here. We assume, without deciding, that failure to instruct on materiality was "structural," and that such an error can be corrected by an appellate court regardless of whether the defendant demonstrates prejudice.

Here is where we are so far in applying *Olano*. There was error, because subsequent to trial, materiality became a jury issue. The error is plain, for purposes of correctability, because it became plain pending review. We assume without deciding that failure to instruct on materiality is "structural," so appellant need not establish prejudice.

Olano treats these three prerequisites as necessary but not sufficient to empower a court of appeals to correct a trial error. Even where all three prerequisites are established, whether to correct the error remains discretionary with the Court of Appeals.

> Rule 52(b) is permissive not mandatory. If the forfeited error is "plain" and "affects substantial rights," the Court of Appeals has authority to order correction, but is not required to do so.

Olano, — U.S. at ——, 113 S.Ct. at 1778.

The Court has instructed us on the criteria for exercise of this discretion. We should correct error

which caused a "miscarriage of justice," that is, conviction of an innocent person. Aside from preventing such miscarriages of justice, the standard the Court requires us to apply is whether "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at ——, 113 S.Ct. at 1779, quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). An error may meet the second criterion independently of whether it meets the first. "Conversely, a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, — U.S. at ——, 113 S.Ct. at 1779.

This statement by the Court necessarily implies that even if error is "structural," and even if "structural error" is presumed to affect substantial rights for purposes of the third prerequisite to correctability, a Court of Appeals nevertheless should not reverse because of structural error not raised at trial, unless the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." The argument that any structural error must necessarily, by virtue of being "structural," so affect judicial proceedings, cannot withstand the Court's careful preservation in the "Conversely . . ." sentence of appellate discretion *not* to correct all plain errors affecting substantial rights.

The *Atkinson-Olano* standard requires a case by case exercise of discretion. In *Gaudin*, we held that withdrawing an element of the crime from the jury meets the "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" standard, but we took note of the "serious factual question"

regarding the withdrawn element in that case. *United States v. Gaudin*, 28 F.3d 943, 952 (9th Cir.1994) (en banc). Under *Olano*, it is not possible to substitute a mechanical rule for the exercise of discretion case by case. Even assuming that a forfeited error is "plain" and "affects substantial rights," so that the Court of Appeals has authority to order correction, nevertheless that appellate court is not required to do so. *Olano*, — U.S. at ——, 113 S.Ct. at 1778. Unlike *Gaudin*, the case at bar did not present a "serious factual question" regarding the omitted element.

A statement is material "if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Clark*, 918 F.2d at 846 (internal quotation omitted). A statement may be material even if it is relevant only to a subsidiary issue under consideration. *Id.* Materiality of Keys' false testimony was not at issue, and it is hard to see how it could have been. Keys was testifying to show the jury that the prosecution witness was a liar. The prosecutor asked the questions about the kite to show that Keys was a liar. Keys denied sending the kite to refute the prosecutor's implication that he was lying, in order to bolster his attack on the prosecution witness. Keys could have no doubt, when he testified, that it might matter to the jury whether he had sent the kite. Because there was no serious factual question regarding the element on which the court, on defendant's invitation, did not instruct, the error could not seriously affect the fairness, integrity or public reputation of judicial proceedings. In the circumstance of an error which did not matter, and

was not error when made, reversal of the conviction rather than affirmance would impair the fairness, integrity and public reputation of judicial proceedings. It is unfair to vacate the conviction of a guilty man because of an error which he invited and which did not matter in his trial. The integrity of our judicial system as a means of distinguishing the innocent from the guilty, and its reputation as a fair and reliable system, would be impaired by vacating a guilty man's conviction based on immaterial error.

Though this discussion resembles harmless error analysis, it goes to the exercise of discretion, rather than correctability under the "affects substantial rights" prerequisite. There may be errors otherwise harmless which, if they can get past the "affects substantial rights" prerequisite by being structural, do seriously affect the fairness, integrity or public reputation of judicial proceedings. This one does not. If Keys were to get his conviction reversed because the judge did not instruct the jury to acquit unless it thought it mattered whether he lied about sending the kite, his reversal would convert his initial trial into a game of chance.

C. Standard of Proof.

When the district court made its express finding of fact that Keys' lie was material, the judge did not expressly recite that the fact was proved beyond a reasonable doubt. Keys now argues that the case should be reversed on this ground, but he did not object at trial, ask the court what standard of proof it applied, ask the court to apply the beyond a reasonable doubt standard, or otherwise raise the issue. Although it is possible that the court applied a lower

standard of proof, *see United States v. Martinez*, 855 F.2d 621 (9th Cir.1988), we decline to exercise our discretion to review. Because the materiality of Keys' lie about the kite was not a "serious factual question," the quantum of proof of materiality did not matter. Any error, therefore, in selecting the appropriate standard of proof for materiality does not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, — U.S. at ——, 113 S.Ct. at 1778.

D. Sentencing.

Keys received a consecutive sentence. That meant that he would serve his five years on his perjury conviction after he completed his twenty year sentence for armed bank robbery. He argues that he should have received a concurrent sentence instead. That would have the practical effect that any time remaining on his bank robbery sentence would count against his perjury sentence, so that he would do no additional time, or at least less than an additional five years, depending on how the release dates worked out.

He argues that the Sentencing Guidelines required consecutive sentencing, but a controlling statute provided for judicial discretion whether to impose consecutive or concurrent sentences, so the judge sentenced under an invalid guideline. The statute, 18 U.S.C. § 3584(a), provides in pertinent part: "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms *may* run concurrently or consecutively. . . ." The Sentencing Guideline, U.S.S.G. § 5G1.3(a), says "*shall* be imposed to run consecutively." The district judge said that he understood

that the sentences were to be consecutive unless he exercised his discretion to depart downward. The district judge recognized that he had authority to depart downward and to order that the sentences be served concurrently, but he found no reason to do so. This was proper and unreviewable under *United States v. Lail*, 963 F.2d 263 (9th Cir.1992).

Keys also argues that his sentence was too harsh, because it was affected by what the former DEA agent did, not just what he did.

Keys is correct in his assertion that perjury may be sentenced more or less harshly depending on the conduct of the defendant in the case in which the perjury is committed. Perjury has a base offense level of 12. U.S.S.G. § 2J1.3. Section 2J1.3(c)(1) provides: "If the offense involved perjury or subornation of perjury in respect to a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above." U.S.S.G. § 2X3.1 provides that for accessory after the fact, the base level is "6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30." These provisions yielded an offense level of 26, not the base level of twelve. The guideline range was 120-150 months, but the statutory maximum for the perjury offense was five years, 18 U.S.C. § 1623(a), so Keys was sentenced to serve five years.

Keys cites no authority for the proposition that the sentencing scheme was inappropriate in this respect. We see nothing wrong with it. Perjury is a serious crime in any circumstance, but it is considerably more serious in a major felony prosecution than in,

say, a minor misdemeanor. The increased sentence is not a fortuitous result of the seriousness of the other persons' conduct who is the subject of the trial in which the perjury is committed. The perjurer's conduct is itself more gravely wrongful if the proceeding in which it occurred had greater stakes.

AFFIRMED.